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In the Supreme Court of the United States

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

THOMAS J. WAGNER
JOHN W. SIMS
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Attorneys for Petitioner

Of Counsel: PHELPS, DUNBAR, MARKS, CLAVERIE & SIMS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTION PRESENTED FOR REVIEW

The Federal Water Pollution Control Act, an important and comprehensive statute with a full legislative history, expressly established strict liability for oil spill cleanup costs subject to statutory limits of liability unless the spill was caused by willful negligence or willful misconduct. The question presented for review is whether the statutory liability and limit are exclusive or may the courts expand the statutory liability and limit by reference to a statutory "savings" clause inapplicable to those parties whose liabilities are delineated by the Act.

LIST OF PARTIES

The parties to the Fifth Circuit proceedings were the United States of America, Zito Towing, Inc. as owner of the M/V BIG SAM, and Mission Insurance Company. The Water Quality Insurance Syndicate filed a brief as *amicus curiae* in support of the petition for rehearing. The concerns affiliated with Mission Insurance Company are as follows:

Mission Insurance Group
Enterprise Insurance Company
Mission National Insurance Company
Holland America Insurance Company
Mission Reinsurance Corporation
Pacific Reinsurance Management Corporation
Sayre and Toso, Inc.
George S. Kausler, Limited
Sayre and Toso, Inc. of Louisiana
Sayre and Toso, Inc. of Illinois
Sayre and Toso, Inc. of Massachusetts
Carillon Managers International

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

MISSION INSURANCE COMPANY,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Mission Insurance Company, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on July 30, 1982.

OPINIONS BELOW

All of the opinions below are contained in the Appendices to the Petition for Certiorari. Appendix "B" is the Fifth Circuit's decision in *United States v. M/V BIG SAM*, 681 F.2d 432 (5th Cir. 1982), the judgment from which review is sought from this Court. Appendix "C" is the Fifth Circuit's denial of rehearing and rehearing *en banc*, published at 693 F.2d 451 (5th Cir. 1982). Appendices "D", "E", and "F" are the district court's opinions in *United States v. M/V BIG SAM* published at 454 F.Supp. 1144 (E.D.La. 1978), 480 F.Supp. 290 (E.D.La. 1979), and 505 F.Supp. 1029 (E.D.La. 1981).

JURISDICTION

The judgment of the court of appeals was entered on July 30, 1982, and the timely filed petition for rehearing and rehearing *en banc* was denied on December 13, 1982.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions involved are 33 U.S.C. § 1321(f)(1),(g), and (h) which are set out in Appendix "A" in their form at the time of the incident in question.

STATEMENT OF THE CASE

On April 25, 1975, the Motor Vessel BIG SAM, a 155-ton towboat, collided with the Tank Barge BUTANE which was holed and discharged oil into the Mississippi River. The BIG SAM was owned by Zito Towing, Inc.

(Zito) and bareboat chartered and operated by Tri-Capt, Inc. The owner of the BUTANE commenced cleanup operations, and the United States completed the cleanup operations, expending $277,000. In the ensuing collision litigation, Tri-Capt, Inc. was found solely at fault. *Naptha Barge Co. v. Continental Navigation Co.*, Civil Action No. 75-1281, 1978 A.M.C. 501 (E.D.La. 1977). The issues involved in the collision litigation have been concluded and are not in dispute.

Following the conclusion of the collision litigation, the United States in 1978 initiated these proceedings to recover its oil removal costs. The Government brought suit in the United States District Court for the Eastern District of Louisiana* against Zito Towing, Inc. and Tri-Capt, Inc. *in personam* and the Barge BUTANE and Tug BIG SAM, *in rem.* Subsequently, Mission Insurance Company (Mission), the protection and indemnity insurer of the tug, was named as a party-defendant. The Government sought recovery based on the Federal Water Pollution Control Act, 33 U.S.C. §1321 (1972) (hereinafter referred to as the "FWPCA"); the Rivers and Harbors Act of 1899, 33 U.S.C. §407 (1899) (commonly and hereinafter referred to as the "Refuse Act"), and the general maritime law. Zito and Mission defended the suit on the grounds that the FWPCA provides the Government's exclusive remedy and limits recovery for negligent spills to $15,500, the applicable statutory limit in absence of willful fault.

The district court initially held that the Government was not limited to the remedies provided by the FWPCA, and could recover as well under both the general maritime

* Jurisdiction in the district court existed under the court's federal question jurisdiction, 28 U.S.C. § 1331.

law and the Refuse Act. *United States v. M/V BIG SAM,* 454 F.Supp. 1144 (E.D.La. 1978). See Appendix D. Subsequently, following the submission of additional memoranda by all parties, the district court vacated the previous ruling and held that the Government was limited to those remedies specified under the FWPCA. *United States v. M/V BIG SAM,* 480 F.Supp. 290 (E.D.La. 1979). See Appendix E. Following this ruling, the parties submitted the case for decision on stipulated facts. The district court entered judgment in the amount of $15,500 (the FWPCA statutory limit) in favor of the United States against Tri-Capt, Inc., the bareboat charterer and operator of the BIG SAM. All other claims were dismissed, and the Government's *in rem* claim was disallowed. *United States v. M/V BIG SAM,* 505 F.Supp. 1029 (E.D.La. 1981). See Appendix F.

Upon appeal by the United States, the United States Court of Appeals for the Fifth Circuit reversed, in part, the district court's judgment. The decision by Circuit Judge Tate held that the United States may recover the total cleanup costs under the general maritime law, notwithstanding the statutory limit. *United States v. M/V BIG SAM,* 681 F.2d 432 (5th Cir. 1982). See Appendix B. The Fifth Circuit affirmed the district court's ruling that the Government's claim under the Refuse Act was preempted by the FWPCA.

Petitions filed by Zito and Mission for rehearing and rehearing *en banc* were denied by the Fifth Circuit. *United States v. M/V BIG SAM,* 693 F.2d 451 (5th Cir. 1982). See Appendix C. Circuit Judge Gee, joined by Circuit Judges Brown, Rubin and Jolly dissented, stating the refusal to consider the case *en banc* "preserves a clear conflict in principle" within the Fifth Circuit. *United States v. M/V BIG SAM,* 693 F.2d at 459

Petitioner respectfully files this Petition for Writ of Certiorari to review the Fifth Circuit's decision, and to resolve the conflicts created by its construction of this important statute.

ARGUMENT

The BIG SAM decision disregards the legislative history, substitutes its own evaluation of policy considerations for that of Congress, and departs from established principles of statutory construction, thereby achieving a result contrary to prior holdings of this Court, and creating a conflict between circuits with respect to this important statute.

INTRODUCTION

During the 1960's, the demand for imported oil and petroleum products in the United States greatly increased. The consequent growth in the transportation of oil and petroleum products by sea inevitably led to larger tank vessels. The TORREY CANYON disaster and resulting pollution of the coasts of England and France in 1967 and the Santa Barbara oil spill in 1969 aroused public concern regarding the hazards of oil pollution and spurred the development of a comprehensive legislative program to deal with hazards relating to transportation of oil.[1] Congress responded to this public concern with the enactment of the Federal Water Quality Improvement Act of 1970,

[1] *See*, Water & Environmental Quality Improvement Act of 1970, H.R. Rep. No. 127, 91st, Cong., 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691, 2692-93. A number of decisions contain expositions of the circumstances surrounding the development of this legislation. *See, e.g. United States v. Bear Marine Services*, 509 F.Supp. 710 (E.D.La. 1980); *United States v. Tug J.P. McALLISTER*, Slip Opinion, Civil Action No. 76-462 (D.P.R. April 3, 1980).

which amended and was incorporated within the Federal Water Pollution Control Act of 1948. 33 U.S.C. § 1161 (1970). Subsequently, this legislation was amended to include hazardous substances as a part of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA), 33 U.S.C. § 1251, *et seq.*

Several decisions of this Court have noted the importance and comprehensive scope of this legislation. Shortly after its enactment, this Court noted that this statute "contains a pervasive system of federal control over discharges of oil." *Askew v. American Waterways Operators,* 411 U.S. 325, 330 (1973). In subsequent decisions dealing with the statute's provisions for the abatement of sewerage discharges, the Court has emphasized the comprehensive nature of this legislation. *Train v. City of New York,* 420 U.S. 35, 37; *Milwaukee v. Illinois,* 451 U.S. 304, 317-319 (1981); *Middlesex City Sewerage Authority v. National Sea Clammers Assoc.,* 453 U.S. 1, 21-22 (1981). In *Milwaukee,* the Court quoted Senator Randolph's description of the FWPCA as "perhaps the most comprehensive legislation in its field." *Milwaukee v. Illinois,* 451 U.S. at 318. Likewise, in the dissent to a denial of certiorari in a case involving the subsections relevant to the present case, Justice Rehnquist noted "the vital importance" of this legislation. *Hollywood Marine, Inc. v. United States,* 451 U.S. 994 (1981).

In enacting this legislation and this particular section (33 U.S.C. § 1321), Congress confronted a difficult legislative task. Congress had to consider major divergent and conflicting issues of national policy, centering on the importance of oil to the United States and the need to protect America's waters. The hearings and legislative process focused on multiple aspects of these national

issues—the need for oil, the recognition that oil would be transported by water, the consequences of both major and minor spills, the need to provide for prompt and proper cleanup, the evaluation of anticipated cleanup costs, the need to establish an effective remedy for recovery of cleanup costs, the need to protect and preserve maritime commerce from crushing liability, the insurability and cost of insurance for such cleanup liability, and the effect of cleanup liability and insurance costs on maritime commerce.[2]

In view of these conflicting policy considerations, not surprisingly the Senate and House of Representatives proposed conflicting and inconsistent legislative responses. In the portions pertinent to this litigation, the House bill proposed liability of dischargers and third parties for cleanup costs incurred as a result of a willful or negligent spill. This liability would be subject to a specific statutory limit. H.R. 4148, 91st Cong. 1st Sess., § 17(e). *See,* H.R. Rep. No. 127, 91st Cong. 1st Sess. *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691 at 2701. The pertinent part of the Senate proposal would have imposed strict liability upon dischargers for cleanup costs subject to limits different from those in the House bill. The Senate proposal would also have allowed the United States recovery of all cleanup costs beyond the statutory limit upon proof that the discharge was caused by the discharger's negligence or willful act.[3] In

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[2] *See* S. Rep. No. 351, 91st Cong., 1st Sess. 5 (1969); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 617 (4th Cir. 1979).

[3] Sec. 12(f), Senate Amendment to H.R. 4148, *reprinted in* 1970 U.S. Code Cong. & Ad. News 2691 at 2721. The Senate bill did not address third parties, and its "savings" clause provided that the statutory liabilities of dischargers did not affect the right of dischargers or the United States against third parties, who were not covered by the statute. *Id.* at Section 12(l).

the legislative laboratory of the conference committee, the diverse and conflicting policy considerations and proposals were weighed and reweighed, and ultimately, the Federal Water Quality Improvement Act of 1970 was enacted.[4] Although the Senate proposal was rejected in Congress, the *BIG SAM* decision judicially resurrects the rejected Senate provision which would have allowed recovery of excess costs upon proof of ordinary negligence rather than the willful conduct required in the legislation.

This legislative compromise, distilled from multiple policy considerations, set up the following comprehensive liability scheme with regard to cleanup costs incurred by the United States:

> a) strict liability subject to statutory limits for dischargers and for third parties whose acts or omissions solely cause a spill,
>
> b) liability for costs in excess of statutory limits providing the United States can establish that the spill was caused by willful neglect or willful misconduct within the privity or knowledge of the discharger or third party. 33 U.S.C. § 1321(f),(g) (1972).

The FWPCA explicitly specifies the standard of liability, defenses, limits of liability and excess exposure for dischargers and for third parties whose acts or omissions solely cause a spill. The Act does not specify a liability scheme for other parties, that is, third parties whose acts *partially* cause a spill; however, Section 1321(h) provides that the liabilities established under the Act

[4] Pub.L. 91-224, § 102, 84 Stat. 91 (formerly codified at 33 U.S.C. § 1161), (subsequently recodified with the FWPCA Amendments of 1972 as 33 U.S.C. § 1321).

do not affect the rights of dischargers or the rights of the United States against third parties "whose actions may in any way have caused or contributed" to a spill. 33 U.S.C. § 1321(h) (1972). The Fifth Circuit relied upon this subsection in creating[5] a remedy to recover excess costs from third parties whose acts solely cause a spill and whose liability scheme is expressly specified in Section 1321(g).[6] In this holding, the Fifth Circuit has altered the statutory scheme and, in effect, nullified the Congressional compromise and balance achieved by the FWPCA.

I. IN HOLDING THAT SECTION 1321(h) PERMITS THE UNITED STATES TO PURSUE A GENERAL MARITIME TORT (NEGLIGENCE) CLAIM FOR RECOVERY OF CLEANUP COSTS IN EXCESS OF THE STATUTORY LIMIT PRESCRIBED IN SECTION 1321(g), THE *BIG SAM* DECISION IS CONTRARY TO THE APPLICABLE AND CONTROLLING DECISIONS OF THIS COURT IN *MOBIL OIL*

[5] As a previous panel of the Fifth Circuit had noted, the Government had never previously recovered oil spill cleanup costs under either the Refuse Act or common law. *United States v. Dixie Carriers*, 627 F.2d 736, 738 (5th Cir. 1980). Zito Towing, Inc. will expressly contest this holding of the BIG SAM decision in its petition to this Court.

[6] The Court's reliance on Section 1321(h)(2) is misplaced. Section 1321(h) was a creation of the Senate-House conference committee. It was an amalgamation of the Senate section 12(1) dealing with third parties *who were not included within the Senate's liability scheme* and the House Section 17(e)(2) which provided that the burden of proof specified in this bill did not affect the rights of dischargers against others "whose willful act or negligence may in some way have caused or contributed to the discharge." H.R. Rep. No. 127, 91st Cong. 1st Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News 2720, 2721. Neither the House nor the Senate provision specified or preserved alternate or greater liabilities for those interests covered by this legislation. Nor did either bill attempt to preserve liabilities inconsistent with this section. *See* 33 U.S.C. § 1371(a)(1) (1972).

CORPORATION V. HIGGINBOTHAM AND *MILWAUKEE V. ILLINOIS*

In this litigation, the United States seeks to recover costs in excess of the statutory limit without proof of willful negligence or willful misconduct on the part of the operator of the Tug BIG SAM as required by 1321(g). The *BIG SAM* decision granted such recovery by reference to Section 1321(h)(2), which provides that the statutory liabilities shall "in no way affect any rights which...the United States may have against third parties whose actions may in any way have caused or contributed" to a spill. By virtue of Section 1321(h)(2), the decision suggests, a general maritime remedy may be utilized by the United States to recover additional removal costs without limitation[7] by the express provisions regarding third-party liability under Section 1321(g). In so holding, the decision effectively erases the statutory limitation and allows the excess recovery without the requisite proof of willful neglect or willful misconduct.

In recognizing the general maritime remedy and allowing this recovery, the *BIG SAM* decision is contrary to the principles announced by this Court in *Milwaukee v. Illinois*, 451 U.S. 304 (1981), and *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978). In *Milwaukee*, this Court undertook a thorough analysis of the scope of the point discharge permit program established under the FWPCA. Finding that Congress had thoroughly considered the issues surrounding the permit program and

[7] The Fifth Circuit's interpretation of Section 1321(h)(2) is in conflict with the interpretation suggested by the Second Circuit in *Matter of Oswego Barge Corp.* 644 F.2d 327, 341 (2d Cir. 1981) and with the interpretation of Judge Arceneaux in *United States v. Bear Marine Services*, 509 F.Supp. 710 (E.D. La. 1980). The interpretation of this subsection and this conflict are discussed in Section II, *infra*.

had enacted a comprehensive program and remedial procedure dealing with this issue, this Court held that the federal courts could not augment the statutory remedies with judicial remedies fashioned under the federal common law of nuisance. *Milwaukee v. Illinois*, 451 U.S. at 313-319. In so holding, this Court noted that the common law or judicial approach to national problems, which often produces a sporadic, piecemeal or case-by-case solution,[8] is particularly inappropriate when Congress has considered the question and enacted comprehensive legislation to address issues of national concern. *Id.* at 316-319, 325.

The principles in *Milwaukee* were reaffirmed in *Middlesex City Sewerage Authority v. National Sea Clammers Assoc.*, 453 U.S. 1 (1981). Both the *Milwaukee* and *Middlesex* decisions disapprove of supplemental judicial or federal common law remedies despite arguments from claimants that such remedies were preserved pursuant to express savings clauses or legislative history. In *Middlesex*, this Court stated:

> In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under MPRSA and FWPCA. As we stated in *Transamerica Mortgage Advisers, supra*, "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 444 U.S. at 19, 62 L.Ed.2d 146, 100 S.Ct. 242. See also *Touche Ross & Co. v. Redington, supra*, 442 U.S. at 571-574, 61 L.Ed. 2d 82, 99 S.Ct. 2479. *In the absence of strong*

[8] *See, e.g. Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 319 (1955).

> *indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropirate.*

453 U.S. at 15 (emphasis added).

Congress thoroughly considered the liability scheme for recovery of cleanup costs. At the time of this collision, the FWPCA limits of liability for dischargers and third parties were $100 per gross ton of the discharger's or the third party's vessel, or $14,000,000, whichever was less.[9] In setting these limits, Congress recognized that there would be occasions when the United States would not recover its full cleanup expenses and that those limits would need adjustment in accord with the dictates of experience once the statute was applied.[10] Nothing in the legislative history suggests that these limits were intended to be anything more or less than what they are—limits on liability.

The *BIG SAM* decision violates the principles announced in *Milwaukee*. In setting these limits Congress balanced conflicting policy considerations—the need to

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[9] See Appendix A. These statutory limits were subsequently raised by Congress in 1977. Clean Water Act of 1977, Pub.L. 95-217 § 58(d)(2), 91 Stat. 1566, 1595 (codified at 33 U.S.C. § 1321(f)(l)). In amending these limits, Congress expressed no concern or indication that alternative or cumulative remedies should be employed or recognized in favor of the United States to recover costs in excess of the statutory limits. *See, Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d at 617-618, n. 15.

[10] *See* note 9, *supra*. *See also United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739-40 (5th Cir. 1980); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 616-18 (4th Cir. 1979); *United States v. Tug J.P. McALLISTER*, Slip Opinion, Civil Action No. 76-462 at 16 (D.P.R. April 3, 1980), and comments of Senator Cooper, 116 Cong. Rec. 9003-04 and remarks of Representative Cramer, 116 Cong. Rec. 9327 (1970) and 115 Cong. Rec. 9020 (1969).

protect America's waters and provide an effective remedy for recovering governmental cleanup costs against the need to protect maritime commerce from potentially crippling liabilities which might not be insurable or might be insurable only at prohibitively expensive rates. In essence, the *BIG SAM* court reweighed those considerations despite the fact that Congress had already expressly addressed them. The court weighed the relative importance of deterring oil spills against the impact of additional liabilities upon third parties and concluded that the national policy of deterring oil spills was more important and should be fostered by allowing additional remedies.[11] The court's substitution of its policy choices for those of Congress was and is not within the proper purview of the federal courts in light of the Congressional enactment.

Recognizing that such determinations should be left to Congress, this Court has previously rejected an attempt to expand judicially the damages recoverable for a maritime wrongful death when such was already addressed by federal statute. *Mobil Oil Corporation v. Higginbotham*, 436 U.S. 618 (1978). In disallowing such an expansion of damages, this Court's language is particularly apposite to the instant dispute:

> We realize that, because Congress has never enacted a comprehensive maritime code, admiralty courts have often been called upon to supplement maritime statutes. The Death on the High

[11] *United States v. M/V BIG SAM*, 681 F.2d at 443-444; *United States v. M/V BIG SAM*, 693 F.2d 454, n.8. If such policy determinations were proper, the BIG SAM interests could have introduced evidence in the lower court concerning the effect of such a decision on the BIG SAM owner and operator as well as evidence regarding the insurability of such a general maritime remedy and/or the costs of such insurance.

> Seas Act, however, announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages....The Act does not address every issue of wrongful-death law, but when it does speak directly to a question, the courts are not free to "supplement" Congress' answer so thoroughly that the Act becomes meaningless....
>
> Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements....There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries. Perhaps the wisdom we possess today would enable us to do a better job of repudiating *The Harrisburg* than Congress did in 1920, but even if that be true, we have no authority to substitute our views for those expressed by Congress in a duly enacted statute.

436 U.S. at 625 (citations omitted).

Section 1321(g) of the FWPCA explicitly specifies the limits of liability of a third party whose acts solely cause a spill. The *BIG SAM* decision ignores that Congressional pronouncement and expands the role of the federal courts beyond the boundaries articulated in the *Higginbotham* and *Milwaukee* decisions. Accordingly, petitioner respectfully submits that the *BIG SAM* decision is contrary to the applicable decisions of this Court and that a

writ of certiorari should be granted in accordance with Rule 17(c) of the Supreme Court Rules.

II. IN RECOGNIZING A GENERAL MARITIME RIGHT IN FAVOR OF THE UNITED STATES TO RECOVER CLEANUP COSTS IN EXCESS OF THE FWPCA LIMIT, THE *BIG SAM* DECISION CREATES A FUNDAMENTAL CONFLICT IN PRINCIPLE WITH DECISIONS OF THE SECOND, FOURTH AND NINTH CIRCUITS AS WELL AS WITHIN THE FIFTH CIRCUIT.

The *BIG SAM* decision deals with third party liability under Section 1321(g). The earlier Second, Fourth and Fifth Circuit decisions in *Oswego Barge, Steuart Transportation,* and *Dixie Carriers,*[12] respectively, dealt with the liability of a discharger under Section 1321(f). The discharger's liability and limits under Section 1321(f) are specified in terms virtually identical to the liability and limits of the third parties prescribed under Section 1321(g). Thus, although their liabilities arise under separate subsections, the statutory scheme—standard of liability, defenses, limitation, and excess liability—is identical for dischargers and for third parties who solely cause a spill.[13]

In its petition for rehearing *en banc,* petitioner urged that the *BIG SAM* decision was contrary to the earlier

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[12] *Matter of Oswego Barge Corp.*, 664 F.2d 327, 344 (2d Cir. 1981); *Steuart Transp. Co. v. Allied Towing Corp.*, 596 F.2d 609, 614-18 (4th Cir. 1979); *United States v. Dixie Carriers, Inc.*, 627 F.2d 736, 739 (5th Cir. 1980).

[13] Indeed, the parallel between discharger and third-party liability was conceded by the *BIG SAM* court. *United States v. M.V BIG SAM,* 681 F.2d at 440-41.

Fifth Circuit decision in *Dixie Carriers* and to the decisions of the Second and Fourth Circuits in *Oswego Barge* and *Steuart Transportation*, respectively. The United States, in reply to the *amicus* brief, concurred in the request for a rehearing *en banc* and conceded that certain parts of the *BIG SAM* decision were in conflict with *Dixie Carriers*.[14] In denying rehearing and rehearing *en banc*, the panel stated that there was no conflict since *Dixie Carriers* (as well as *Oswego Barge* and *Steuart Transportation*) dealt with a discharger's liability, not third-party liability for which Section 1321(h)(2)[15] created an exception. The panel then reiterated its conclusion that a governmental right of action to recover excess cleanup costs under the general maritime law would not be inconsistent with the statutory remedy. *United States v. M/V BIG SAM*, 693 F.2d at 454-56.

The dissent to the denial of rehearing by Circuit Judge Gee, concurred in by Circuit Judges Brown, Rubin and Jolly, disagreed and noted the "fundamental conflict in principle" between the *BIG SAM* and *Dixie Carriers* decisions. *Id.* at 459. The dissent expressly recognized the patent inconsistency between the FWPCA remedy with its statutory limit and the general maritime remedy for excess costs without the requisite proof of willful misconduct or willful negligence. Because of this essential conflict between panel decisions, the dissent expressed the view that the denial of rehearing *en banc* had passed to the Supreme Court the duty to reconcile this intracircuit conflict. *Id.*

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[14] See United States' Reply to Original Brief of Amicus Curiae, Water Quality Insurance Syndicate in Support of Petitions for Rehearing and for Rehearing *En Banc* at vii.

[15] As noted earlier, this interpretation of this subsection is not supported by the legislative history. See note 6, *supra*.

The fundamental conflict is not, however, nestled within the confines of the Fifth Circuit. As noted above, the *Dixie Carriers* decision is in accord with the Fourth and Second Circuit decisions in *Steuart Transportation* and *Oswego Barge*.[16] In the former decision, the Fourth Circuit noted that the legislative history weighed against a preservation of other remedies and held that the statutory limit was to be the maximum cleanup cost recovery. *Steuart Transportation Co. v. Allied Towing Corp.*, 596 F.2d at 617. The *Steuart* court noted that judicial remedies inferred under the Refuse Act or under the general maritime law were inconsistent with the liability and limitation standards of the FWPCA and that recoveries under those remedies would nullify the limitation provided for by the statute. *Id.* at 618. Likewise, in *Oswego Barge*, the Second Circuit held that the preemptive scope of the FWPCA precluded a general maritime law remedy in favor of the United States. The *Oswego Barge* court stated that the FWPCA and general maritime law remedies were so inconsistent that permitting a judicial or general maritime law recovery would be tantamount to "rewriting the rule that Congress has enacted." *Oswego Barge*, 664 F.2d at 343, 344.

The Second Circuit in *Oswego Barge* specifically considered, without deciding, the effect and meaning of Section 1321(h)(2), the "savings" clause upon which the Government relies. The court expressed some uncertainty although its footnoted comments suggested possible agreement with the interpretation that Section 1321(h) applies only to *those parties or interests not covered by Sections 1321(f)* or *(g)*. *Oswego Barge*, 664 F.2d at 341. Such

[16] *See also Tug OCEAN PRINCE v. United States*, 584 F.2d 1151, 1162 (2d Cir. 1978).

parties or interests would be third parties whose acts or omissions contribute to or *partially* cause a spill. This was the interpretation given this section by Judge Arceneaux of the Eastern District of Louisiana in *United States v. Bear Marine Services*, 507 F.Supp. 710 (E.D.La. 1980). This interpretation conflicts with the *BIG SAM* decision which employs Section 1321(h) with reference to third party interests specifically covered under Section 1321(g). As noted earlier, the *Oswego Barge-Bear Marine* interpretation is consistent with the legislative history of the statute.[17] Section 1321(h) was "born" from a Senate proposal which was not directed at interests covered by the statute and from a House proposal which in no way expanded the third party's liability to the United States for cleanup costs.[18] The *BIG SAM* interpretation ignores the legislative history and distorts the Congressional liability scheme.

The *BIG SAM* decision is likewise in conflict with the Ninth Circuit decision in *United States v. City of Redwood City*, 640 F.2d 963 (9th Cir. 1981). There, the Ninth Circuit, while allowing a general maritime law claim for recovery of cleanup costs by the United States against non-vessel third parties, noted that the recovery sought by the United States was not in excess of the statutory limitation. *Id.* at 970. The court stated that the proof of willful negligence or willful misconduct was limited to situations where the United States sought recovery of costs in excess the limitation provided under Section 1321(g). *Id.* at 969. Accordingly, although *Redwood City* recognizes a general maritime remedy, it specifically limits that remedy in a fashion consistent with the statutory limitation set forth in Section 1321(g).

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[17] See note 6, *supra*.

[18] *Id.*

The dissent to the denial of rehearing *en banc* notes that the *BIG SAM* decision represents a "single-minded focus" on section 1321(h). *United States v. M/V BIG SAM*, 693 F.2d at 459. The *BIG SAM* decision ignores and effectively nullifies the limitation contained in Section 1321(g). This decision creates the fundamental conflict in principle with the decisions in the Second, Fourth and Ninth Circuits. Petitioner respectfully submits that this conflict warrants a grant of certiorari pursuant to Rule 17(a) of the Supreme Court Rules.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

THOMAS J. WAGNER
JOHN W. SIMS
1300 Hibernia Bank Building
New Orleans, Louisiana 70112
Attorneys for Petitioner

OF COUNSEL:

PHELPS, DUNBAR, MARKS, CLAVERIE
& SIMS